No. 89-1817

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In The

Supreme Court of the United States

October Term 1990

COUNTY OF RIVERSIDE and COIS BYRD,
SHERIFF OF RIVERSIDE COUNTY,

Petitioners,

vs.

DONALD LEE McLAUGHLIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ARKANSAS, CONNECTICUT, DELAWARE, IDAHO, ILLINOIS, INDIANA, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW JERSEY, NEW HAMPSHIRE, NEW MEXICO, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, and WYOMING IN SUPPORT OF PETITIONERS

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The amici States enumerated above, by their respective Attorneys General, or chief legal officers, submit this brief in support of reversal of the judgment of the United

States Court of Appeals for the Ninth Circuit entered in the proceeding below on November 8, 1989.*

INTEREST OF THE AMICI CURIAE

The amici States, like all States, administer criminal justice systems, and have a vital and ongoing interest in the resolution of the important issues presented by Riverside County, California's efforts to overturn the federal injunction entered below requiring that the judicial probable cause hearing mandated in cases of warrantless arrests by *Gerstein v. Pugh*, 420 U.S. 103 (1975), be initiated a day-and-a-half after arrest regardless of procedures state law otherwise provides. Amici, like Petitioners, submit the United States Court of Appeals erred on two broad fronts in sustaining the preliminary injunction entered below, first in creating a "class-action" exception to this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and, second, in fundamentally misconstruing the nature of the Fourth Amendment right conferred by *Gerstein*.

If not reversed by this Court, the decision below will have substantial effects upon the functioning of the criminal justice systems in the States, as well as in the federal Government. In addition to California, at least a dozen States[1] explicitly authorize, depending upon the facts,

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* The State of Maine joins only in the argument in Part "B" of this Brief and in the accompanying part of the conclusion.

[1] *See* Ga. Code Ann. § 27-212 (1988) (48 hours); Haw. Rev. Stat. § 803-9(5) (1985) (48 hours (but see Haw. R. Penal P. 5(a) (presentment must occur "without delay")); Idaho Code Crim. R. 5(b) and (c) (1987) (24 hours excluding weekends and holidays); La. Rev. Stat. Ann., 1 Code of Crim. Proc. Art. 230.1

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detention of persons arrested on the basis of "a policeman's on-the-scene assessment of probable cause" for periods that exceed the thirty-six hour maximum period allowed by the Court of Appeals prior to the time a magistrate must constitutionally evaluate the officer's probable cause determination. At least twenty-five other States, territories or possessions of the United States appear to implicitly authorize a detention exceeding thirty-six hours.[2] Although Federal Rule of Criminal

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(West Cum. Supp. 1990) (72 hours, weekends and holidays excluded); Maine R. Crim. Proc. 5(a) (1989) (48 hours); Mass. Gen. L. Ann., Crim. P. R. 7(a) (West 1990) (next day (weekends excluded)); Minn. Stat. Ann., Crim. P. R. 4.02 (36 hours, Sundays and holidays excluded); Nev. Rev. Stat. § 171.178 (1987) (72 hours, excluding weekends and holidays); N.M. Stat. Ann., Crim. P. § 7-203 (1978) (24-72 hours, weekends and holidays excluded); N.C. Gen. Stat. § 15A-511, 15A-601 (1989) (not to exceed 96 hours); Or. Rev. Stat. §§ 133.805, 135.010, 135.070 (1989) (36 hours, excluding weekends and holidays); R.I. Sup. Ct. R. Crim. P. 5 (1990) (48 hours excluding holidays and weekends); Wash. Rev. Code Ann., Sup. Ct. Crim. R. 3.2.1(a)(1) (24 hours after arrest not including weekends and holidays).

[2] Ark. Stat. Ann. Ct. R. 8.1, 8.3 (1990) (no unnecessary delay); 7b Colo. Rev. Stat. Ct. R. 5 (1984) (same); Connecticut P.B. §§ 635, 650 (1990) (next day court is in session); Del. Code Ann. Sup. Ct. R. 5 (1975) (no unnecessary delay); D.C. Code Ann. §§ 23.562(c)(1), 23-1322 (1989) (same); Ill. Ann. Stat. Ch. 38, 109-1 (Smith-Hurd 1980) (same); Ind. Code Ann. §§ 35-33-7-1, 35-33-7-2, 35-33-7-3 (Burns 1985) (prompt presentment (up to 72 hours after arrest)); Kansas Stat. Ann. § 22-2901 (1988) (no unnecessary delay); Ky. Rev. Stat. Ann., Crim. Proc. R. 3.02 (Baldwin 1988) (same); Mich. Stat. Ann., R. 2, 6.104 (D) (Callaghan 1990) (no time requirement); Miss. Code Ann. § 99-3-17 (1973) (no unnecessary delay); Mont. Code Ann. § 46-7-102 (1988) (no unreasonable delay); Neb. Rev. Stat.

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Procedure 5(a) requires that a detainee be brought to a magistrate "without unnecessary delay," the strict day-and-a-half rule endorsed by the Ninth Circuit would severely truncate the discretion entrusted to the United States as well.

To be sure, police officials and prosecuting authorities in the amici States are under substantial obligations by reason of the familiar rule that a State "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 420 U.S. at 125 (footnote omitted).

As laws cited in *Gerstein* with approval fifteen years ago make clear, and as this Court confirmed in 1984, "[t]he Court in *Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Schall v. Martin*, 467 U.S. 253, 277 n. 28 (1984). The amici States submit that, in not only departing from this statement of

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§ 29-504 (1989) (as soon as may be possible); N.J. Ct. R. 3:4-3 (1990) (reasonable time); N.Y. Crim. Proc. L. § 140-20 (1984) (without unnecessary delay); N.D. Cent. Code § 29-06-25 (1960) (same); Ohio Rev. Code Ann., R. Crim. P. 4(E)(2) (Baldwin 1989) (same); Okla. Stat. Ann. § 22-181, 22-251 (West 1969) (same); S.D. Codified L. Ann. § 23A-4-1 (1988) (same); Tenn. Code Ann. § 40-5-103 (1982) (same); Texas Code of Crim. P. § 14-06 (1989) (same); Utah Code Ann., Code of Crim. P. § 77-7-23 (1990); Vt. Stat. Ann., Crim. P. R. 3(b) (1983) (same); V.I. Code Ann. §§ 14-3-5-3562 (1988) (reasonable time); W. Va. Code, Crim. P. R. 62-1-5 (1989) (without unnecessary delay); Wis. Stat. § 970.01 (1989) (reasonable time); Wyo. Stat., Crim. P. R. 5 (1978) (without unnecessary delay).

the Constitution's requirements, but in erecting a super-habeas classwide injunctive remedy that departs from the teachings of *City of Los Angeles v. Lyons*, *supra*, the Court of Appeals and the District Court have fundamentally intruded upon the States' prerogatives in the war on crime. Indeed, in abolishing the States' discretion to provide meaningful probable cause hearings, with substantial additional procedural protections, after the day-and-a-half window has closed, the judgment below seriously disserves the interests of arrestees as well. *See FDIC v. Mallen*, 486 U.S. 230 (1988).

For these basic reasons, as elaborated below, the amici States urge the Court to vacate the judgment below and remand with instructions to dismiss the complaints for injunctive relief for want of jurisdiction, or to reverse the judgment below.

ARGUMENT

A. The Court of Appeals Erred in Concluding that Article III "Case or Controversy" Requirements Are Satisfied by a Class's "Shared" Article III Standing.

Under this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the named plaintiffs in this case plainly lacked Article III standing to obtain a federal injunctive remedy of any sort when the preliminary injunction was entered by the District Court twenty months after the complaint in this action was filed. *See* Pet. at 6, 9. In reasoning that the named plaintiffs permanently *"have* standing" because they "were actually suffering the harm for which they *sought* injunctive relief"

"at the time they *filed* their complaint" (888 F.2d at 1277), the Court of Appeals committed fundamental error, and the judgment should be vacated and remanded with instructions to dismiss the complaints for want of jurisdiction. *See generally Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

Contrary to the reasoning of the Court of Appeals, this Court's decision in *Lyons* does not turn upon whether the alleged police misconduct persists long-enough for a federal complaint to be filed. Indeed, this Court has repeatedly reaffirmed that the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990).

Rather, the reasoning of *Lyons*, as Justice Brennan wrote for the Court in *Honig v. Doe*, 484 U.S. 305 (1988), is that "for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Id.* at 320. Indeed, in *Lyons* itself, the Court was extremely careful to focus upon the circumstances when judgment was entered in the District Court. *See* 461 U.S at 99, 110.

The fact that the case was not *moot* did *not* affect the conclusion that Lyons lacked standing when the preliminary injunction motion was heard. *See id.* at 101, 105-106.[3]

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[3] It is noteworthy that in the related litigation of *Kanekoa v. City and County of Honolulu*, 879 F.2d 607 (9th Cir. 1989), the

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And it likewise can make no difference that, in this case, a class is named and certified, for the requirements of Article III standing, like statutory jurisdictional requirements, apply to each member of the class, just as if they were named members of the class. *See Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

Amici nonetheless recognize that in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and, more importantly, in *Schall v. Martin*, 467 U.S. 253 (1984), decided after *Lyons*, this Court failed to apply a *Lyons* analysis to class claims for injunctions against pretrial detention on the view that the plaintiff "could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." *Gerstein*, 420 U.S. at 110 n.11; *see Schall*, 467 U.S. at 256 n.3 (quoting *Gerstein*). Amici nonetheless submit that the rule of *Lyons* should properly control this case, and the judgment should be reversed for want of a "case" or "controversy" as to the claims for equitable relief.

First, as a simple matter of precedent, neither *Gerstein* nor *Schall* address precisely the Article III difficulty presented by the floating injunction entered by the District Court. In both *Gerstein* and *Schall*, the Court's statements sustaining its Article III jurisdiction were addressed to mootness, not standing. Here, as in *Lyons*, "[t]he equitable doctrine that cessation of the challenged conduct does not

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District Judge who sat on the *Lyons* case refused to order injunctive relief despite his belief that the policy of the City and County of Honolulu grossly violated *Gerstein*'s command. *See* Pet. App. 31, *Kanekoa v. City and County of Honolulu, Douglas G. Gibb, and the State of Hawaii*, No. 90-5392 (U.S. May 22, 1990).

bar an injunction is of little help in this respect, for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." 461 U.S. at 109. To the extent *Schall* overlooks any *Lyons* defect in Gregory Martin's challenge to New York's juvenile preventive detention procedures, *Schall* can be properly characterized as a case where jurisdictional error, not presented by New York's appeal, was overlooked as the Court went on to reverse on the merits. *Compare Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 27-30 (1981), *with Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106-17 (1984), *and id.* at 165 n. 49 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ.).

Second, the application of *Lyons* to this case is dictated by the principles and policies that animate this Court's more recent Article III jurisprudence. As this Court suggested in *Honig v. Doe*, 484 U.S. 305 (1988), *Lyons* may be held inapplicable to cases of transitory harm if, and only if, the plaintiff, by specific factual proof, has overcome the Court's reluctance "to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Id.* at 320. No such proof exists in the record of this case. This is simply not a case involving "the misconduct of an emotionally disturbed or otherwise disabled child who has not yet reached adolescence." *Id.* at 322. This reading of *Lyons* accords with this Court's strict reading of standing requirements, and the flat prohibition on the sort of "circular promenade" indulged by the lower courts' transposition of the plaintiffs' standing at

the start of the case to the situation that existed when the District Court entered equitable relief. *Compare Lujan v. National Wildlife Foundation*, 110 S. Ct. 3177, 3189 (1990).

Third, it is not even necessary for the Court in this case to resolve fully the tension between *Lyons* and *Schall*, for there are abundant statutory grounds that ought equitably to be considered as bases for reversing the judgment wholly apart from the merits. For example, it is clear, in this regard, that the District Court erred in allowing Plaintiffs to supplant the scheme for review of state action provided by the federal habeas corpus statute, 28 U.S.C. § 2254, with the scheme provided by 42 U.S.C. § 1983. To the extent any Plaintiff remained "in custody," and thus was capable of invoking the federal habeas statute, that statute, and not § 1983, ought to have been the basis for federal relief. Process does not exist for its own sake, and unless the Plaintiffs are prepared to use any favorable judgment in a probable cause hearing to gain release, Plaintiffs lack an "injury-in-fact." *See Codd v. Velger*, 429 U.S. 624, 627-29 (1977) (per curiam). The very necessity of such relief (release) as an ingredient of Plaintiff's standing theory, however, renders this case inappropriate for § 1983 review. *Cf. Gerstein*, 420 U.S. at 107 n.6 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

Plaintiffs, having not exhausted state remedies, are plainly barred, under the jurisprudence of § 2254, from the relief they obtained below, even if Fed. R. Civ. P. 23, "providing for class actions, is applicable to petitions for habeas corups relief." *Schall*, 467 U.S. at 261 n.10.[4] While

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[4] Likewise, unless this Court is prepared to accept an unprecedented broad reading of *Gerstein*, that a thirty-six hour

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this ground for reversal is not presented directly by the Petition, the Court may consider a "plain error" sua sponte, and it is "beyond debate" that the Court will do so if necessary to avoid decision of a substantial constitutional question. *See DeBartolo Corp. v. Florida Coast Trades Council*, 485 U.S. 568, 575 (1988). Here, the Article III issue is real and substantial, and could be avoided, or at least postponed, by vacating the judgment below for failure to comply with the requirements of habeas exhaustion. This Court's option of doing so, as in cases implicating *Pullman* abstention, *see Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), does not depend upon the express desires of the parties. *See generally Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n. 11 (1978).

In sum, as this Court has remarked on many occasions, the requirement of Article III standing confines the Courts of the United States to a constitutionally prescribed role in our democratic structure. In allowing the District Courts to enter broad injunctive orders requiring basic restructuring of the processes of California's criminal courts, the Ninth Circuit departed from that role and upset "the proper balance between state and federal

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post-arrest delay is on its face unconstitutional, regardless of any surrounding circumstances, then the District Court also erred in certifying a class of detainees. *Compare Honig*, 484 U.S. at 322 (given the strict requirements of the Education for the Handicapped Act and California educational policy the likelihood of collision between petitioner and respondent was "real and substantial" "in any California school district"). Because the individual claims in this case are plainly barred by *Lyons*, elimination of the class requires complete dismissal.

authority." *Lyons*, 461 U.S. at 112. Even if some litigants were entitled to relief, by way of individualized habeas actions, or even prayers for damages, the injunction below is simply answered by that "well-worn adage that 'two wrongs do not make a right,' " *Gray v. Mississippi*, 481 U.S. 648, 663 (1987). For this reason, the judgment should be vacated, and the case remanded with instructions to dismiss the complaints.

B. The Court of Appeals' Conclusion that California Law Does Not Provide a Sufficient Post-Arrest Review of Probable Cause is Directly Contrary to this Court's Precedents.

In holding unconstitutional California's statutorily prescribed mechanism for complying with this Court's mandate in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court of Appeals misperceived this Court's understanding of the "significant pretrial restraint of liberty" that triggers the right to an independent probable cause determination in the first instance, and, more significantly, the "process that is due" once that threshold is crossed. *See Gerstein*, 420 U.S. at 125 & n. 26.

As this Court observed in *Schall v. Martin*, 467 U.S. 253 (1984), *Gerstein* does not "mandate a specific timetable," and in fact "indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Id.* at 275, 277 n. 28. The notion that a precedent of this Court "must be followed," even at the preliminary injunction stage, *see Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam), provides the short answer to this case. *See Gerstein*, 420 U.S. at 123 n. 24 (citing, e.g., Haw. Rev. Stat. § 708-9(5)

(1968) *recodified at* Haw. Rev. Stat. § 803-9(5) (1985)), which provides for a probable cause hearing up to forty-eight hours after effectuation of an arrest).

The proposition that California's two-court-day rule (*see* 888 F.2d at 1278 (quoting California Penal Code §§ 825 and 991)) is unconstitutional under *Gerstein* fails at many levels, and the logic underlying it cannot support the injunction below.

As an initial matter, the Court of Appeals overlooked the facts prompting *Gerstein*. There, pretrial detainees languished in jail for weeks or longer without any guarantee of an independent probable cause determination. *See* 420 U.S. at 106 (delays of "a month or more after arrest"). It is against these facts that the "significant pretrial restraint" that triggers the right to a *Gerstein* hearing must be measured. *See Schall*, 467 U.S. at 275 (*Gerstein* rights triggered only by "extended restraint on liberty"); *cf. United States v. Salerno*, 481 U.S. 739, 749 (1987) (*Gerstein* authorizes "substantial liberty restrictions"). The notion that no "safe harbor" exists and all pre-presentment delay exceeding a few hours after arrest must be justified by reference to case-specific factors warranting such delay belittles the controversy that provoked *Gerstein*.

The central point that merits emphasis here is that the premise of the Court of Appeals' judgment entirely fails to take into account this Court's mandate that *Gerstein*'s logic need not deter " 'flexibility and experimentation by the States' " in devising procedures following a warrantless detention. *Schall*, 467 U.S. at 275. The Ninth Circuit's assessment of the "stay-equities," although not

conclusively final for purposes of the litigation below, so clearly departs from this mandate that it should be reversed as a matter of law. For, in upholding the District Court's injunction, the Ninth Circuit has eliminated the States' prerogative to "experiment" with procedures that provide *better* process than would occur under the Court of Appeals' own judgment. The judgment below is thus is erroneous.

As the Second Circuit Court of Appeals has reasoned, "the constitutional 'promptness' of a probable-cause hearing must be determined in light of the totality of the processes afforded the defendant." *Williams v. Ward*, 845 F.2d 374, 386 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989). Indeed, this is – and has been – the essence of this Court's analysis of procedural due process questions for well over the past decade. *See generally Zinermon v. Burch*, 110 S. Ct. 975, 984 (1990) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Here, as in *Williams*, the State of California, like numerous States, does not provide just "minimal ex parte procedures," 845 F.2d at 387, but full adversary proceedings. *See* California Penal Code §§ 825 and 991. The fact that members of the class might not receive a probable cause hearing in the first thirty-six hours after arrest is irrelevant because they are not entitled to one in light of California's legitimate interest in delaying *all* arrestees' hearings under *Gerstein*.

These interests, in large measure, are the detainee's interest as well, and, for this central reason, the judgment below is wrong. As this Court has made clear in decisions such as *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S.

230 (1988), those accused of wrongdoing have "an interest in seeing that a decision concerning his or her continued suspension [of freedom] is not made with excessive haste." *Id.* at 243. This logic applies with equal force to suspensions of liberty. *See Zinermon*, 110 S. Ct. at 986. Indeed, because the findings of a *Gerstein* hearing, once concluded in favor of the State, may authorize a very substantial pretrial period of detention, the pretrial detainee's interest not just in speed, but accuracy, is at its height. Such delays not only "work to the advantage of the [detainee] since it gives his counsel . . . time to prepare," *Schall*, 467 U.S. at 277 n. 28, but allow the informed exercise of prosecutorial discretion, *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985). By forcing the State to firmly commit to criminal action within the first day-and-a-half after arrest, the Ninth Circuit mandates the very sort of hasty decisionmaking that this Court has condemned. There is no support, in precedent, or logic, for the Ninth Circuit's overriding state law in this instance, for that law is designed, at its core, to make the detainee *better* off, procedurally, than if minimal *ex parte* process – which *Gerstein* explicitly endorses – were employed. There simply could not be a more "legitimate purpose" to delay in this context, and, as the Ninth Circuit suggested by its silence on the point, the record appears devoid of evidence that the delays experienced by the Plaintiffs were inflicted in order to assess punishment. *See Schall*, 467 U.S. at 269.

Reaffirmation of the "safe harbor" allowed by this Court's precedents is required, however, not only to allow the States the flexibility to experiment with procedures that are more meaningful both to prosecution

and defense, but to accord with this Court's balance of the needs of law enforcement with the rights of an accused in the period between a warrantless arrest and the initiation of the "critical" stages of the criminal process. Irrespective of California's justification for its delay of probable cause hearings to the time of arraignment, it is the majority view that the "administrative steps" the police are permitted to complete prior to presentment include such matters as "completing paperwork, searching the suspect, inventorying property, fingerprinting, photographing, checking for prior record, laboratory testing, interrogating the suspect, verifying alibis, ascertaining similarities to other crimes, and conducting lineups." *Sanders v. City of Houston*, 543 F. Supp. 694, 700 (S.D. Tex. 1982), *aff'd mem.*, 741 F.2d 1379 (5th Cir. 1984); *accord*, *Williams v. Ward*, 845 F.2d at 377-78 (pre-arraignment interviews, fingerprint checks, corroboration of past crimes, and prosecutorial review); *Patzig v. O'Neil*, 577 F.2d 841, 847 (3d Cir. 1978) (breathalyzer tests, and pre-arraignment interrogations). Particularly in cases of felony arrestees, "[t]he law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *United States v. Hensley*, 469 U.S. 221 (1985), *quoted*, *Doulin v. City of Chicago*, 666 F. Supp. 318, 335 (N.D. Ill. 1986), *rev'd on other grounds*, 868 F.2d 959 (7th Cir. 1989). Indeed, endorsement of the Court of Appeals' judgment would, in an important way, threaten the viability of police questioning authorized by 18 U.S.C. § 3501, and override, through an improper expansion of the Fourth Amendment, this Court's longstanding refusal

to codify the *McNabb-Mallory* rules, which § 3501 replaced, as a matter of constitutional imperative.

This is so for one basic reason which appears to have been overlooked by the Court of Appeals for the Ninth Circuit. As this Court observed in *Schall, supra,* even if California procedure might, as applied, violate the Constitution in particular instances, "this sort of attack on a criminal statute must be made on a case-by-case basis." 467 U.S. at 269 n. 18. Put another way, if there is *any* Article III jurisdiction in this case, it is a jurisdiction only to hear a wholly *facial* challenge to California procedure, a challenge that is the most difficult of all challenges to sustain, and which must be overruled if there is *any* circumstance in which the challenged procedures would be lawfully applied. *See United States v. Salerno,* 481 U.S. 739, 745 (1987). Certainly there are instances in which, for various reasons related to the particulars of a case, the routine lineup, show-up, pre-arraignment interview, background or fingerprint check, or other "administrative step" which *Gerstein* permits may consume more than a day-and-a-half, regardless of what may be "needed" in the general case. *Compare* 888 F.2d at 1278. Respondents cannot require this Court to "sift through the entire class to determine whether the statute was constitutionally applied in each case." *Schall,* 467 U.S. at 269 n. 18. As a facial challenge, Respondent's attack on California law confronts the steepest of all possible slopes. Although the case remains in an interlocutory posture, Respondents' burden was not carried, and the judgment below is flawed on the merits.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment of the Court of Appeals and remand with instructions to dismiss the complaints. Should the Court not do so, it should reverse the judgment of the Court below on the merits.

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Respectfully submitted,

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